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In the Supreme Court of the United States

OCTOBER TERM, 1989

BARBARA JUNGEN, Administratrix of the Estate of Alfred John Jungen, and FREMONT INDEMNITY COMPANY, a California Corporation,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Respondent accepts petitioners' statement of the questions presented for purposes of this response.

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OPINIONS BELOW

Respondent accepts petitioners' statement.

STATEMENT OF JURISDICTION

Respondent accepts petitioners' statement.

STATEMENT OF THE CASE

Respondent accepts petitioners' statement.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Oregon's constitution precludes the state from being sued in its own courts unless the legislature has made "[p]rovision . . . by general law, for bringing suit against the State. . . ." Or. Const. art. IV, § 24. *See United Contracting Co. v. Duby*, 134 Or. 1, 7-8, 292 P. 309 (1930). The legislature has provided that the State may be sued for its torts, subject to certain limitations and conditions. *See* Or. Rev. Stat. §§ 30.260 - 30.300. One limitation is that the State may not be sued for discretionary acts that result in personal injury or property damage. Or. Rev. Stat. § 30.265(3)(c). A second limitation, and the one that is at issue here, precludes suing the State over "[a]ny claim for injury to or death of any person covered by any workers' compensation law." Or. Rev. Stat. § 30.265(3)(a).

Petitioner Jungen, as a beneficiary of workers' compensation insurance, and petitioner Fremont Indemnity Company, the insurer who has paid workers' compensation insurance benefits to petitioner Jungen, attack on federal constitutional grounds Oregon's limited retention of sovereign immunity. They contend in their first two claims that denying them the right to sue the State when the State's tortious conduct causes an injury that is compensable under the State's workers' compensation scheme violates the fourteenth amendment's Equal Protection Clause. Petitioners base this claim on the State's waiver of sovereign immunity from suit by beneficiaries of other forms of insurance (*i.e.*, health insur-

ance) and by the insurers who pay those beneficiaries. Petitioners argue that the only difference between beneficiaries of workers' compensation insurance and beneficiaries of other forms of insurance is the "source" of insurance coverage. (Pet. at 7). "This artificial classification," argue petitioners, "does not serve a legitimate purpose, nor is there a rational basis for it." *Id.*

Petitioners' third claim is that Oregon's limited retention of sovereign immunity violates the Commerce Clause. They claim it imposes a burden on interstate commerce by increasing the cost of doing business in Oregon for out-of-state employers and workers' compensation insurance carriers. According to petitioners, this increase, in the cost of doing business flows from the State's unwillingness to allow out-of-state workers' compensation carriers to exercise their home-state statutory and contractual subrogation rights and to sue the State of Oregon in Oregon courts when Oregon's negligent conduct injured one of their insureds while working in Oregon.

Petitioners do not explain why, even if their assertions were accepted at face value, the Oregon Court of Appeals' decision in the matter is of such significance that it merits this Court's review. They do argue that the Oregon court's decision conflicts with the decision of one other state court.[1] However, they fail to explain why the existence of a dispute between two state courts over a federal question makes it imperative that this Court resolve the question.

Petitioners' claims do not warrant this Court's special attention because they clearly are without merit. Petitioners are patently wrong in their assertion that the sole difference between beneficiaries of workers' compensation insurance and beneficiaries of other forms of insurance is the source of

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[1] *Bernthal v. City of St. Paul*, 376 N.W.2d 422 (Minn., 1985).

the insurance. As is discussed, *infra*, there are many differences, principal of which is the nature of the benefits received. Because workers' compensation beneficiaries receive in most instances far more benefits than do other insurance beneficiaries, the State is justified in treating them differently for purposes of its sovereign immunity from suit. Oregon's partial waiver of sovereign immunity from suit serves to provide some compensation to victims of the State's tortious conduct. Because workers' compensation insurance already provides compensation to offset medical expenses and lost income, the State rationally has chosen to spread its limited resources among other potential state tort victims who are not as fortunate as are beneficiaries of workers' compensation insurance.

Petitioners' interstate commerce argument ignores the fact that Oregon treats in-state and out-of-state carriers identically. Petitioners' argument also fails to explain why a State which may retain complete sovereign immunity from suit in its own courts, without violating the Commerce Clause, suddenly violates that clause by waiving that sovereign immunity in part and thereby lessening the impact of its immunity on business crossing its borders.

Finally, the Court should understand that the real party in interest here is not petitioner Jungen, but petitioner Fremont Indemnity Company. Petitioner Jungen's interest in the issues advanced here is minimal. At the time her complaint was filed, she had received from Fremont Indemnity Company over 70 percent of the amount she would have been entitled to if she would have sued Oregon. The complaint further asserted she will be receiving from Fremont additional amounts in the future. Because of Oregon's $100,000 cap on damages liability,[2] and because Fremont Indemnity Company

[2] Oregon's partial waiver of its sovereign immunity is subject to a damages cap of $100,000 per person and $300,000 per occurrence, regardless

(Footnote continued on next page)

is subrogated to petitioner Jungen's rights against Oregon to the extent of benefits Fremont has paid, it is apparent that petitioner Jungen's financial well-being does not hinge on whether she can sue Oregon. In actuality, all or nearly all of what Ms. Jungen might recover would pass through to Fremont Indemnity Company.

Nor is the financial health of Fremont or other out-of-state workers' compensation carriers' at stake here. If their inability to sue Oregon in its own courts to recover amounts paid to beneficiaries is a problem, it is one which Fremont and other carriers insuring employers doing business in Oregon can easily remedy by adjusting their rates. Petitioners' claims are unpersuasive on their merits, they lack importance beyond the outcome in this case, and they are important in this case only to petitioner Fremont Indemnity. The petition for writ of certiorari should be denied.

I. Beneficiaries of workers' compensation insurance are not similarly situated to beneficiaries of other types of insurance for purposes of the fourteenth amendment's Equal Protection Clause.

Petitioners erroneously premise their petition for writ of certiorari on the assumption that persons entitled to workers' compensation benefits are similarly situated to persons entitled to receive other types of insurance benefits, *i.e.*, health insurance benefits. From this faulty premise, petitioners launch their argument that it is arbitrary and discriminatory for Oregon to maintain sovereign immunity from suit by workers' compensation insurance beneficiaries, such as

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of the number of claims made. Or. Rev. Stat. § 30.270. Effective January 1, 1989, the legislature increased these maximum liability amounts for claims arising after that date. *See* 1987 Or. Laws ch. 915, § 14. Under the amended liability cap, a single victim could receive general damages of $100,000 and special damages up to a maximum of $100,000.

petitioner Jungen, while waiving sovereign immunity from suit by beneficiaries of other insurance, for injuries allegedly caused by the State's negligence.

Workers' compensation insurance is vastly different from other forms of insurance, such as "health" insurance. First, workers' compensation insurance insures against loss of income in addition to paying medical expenses incurred because of the injury. Or. Rev. Stat. §§ 656.202 - 656.258. Health insurance, on the other hand, typically pays only medical expenses. Second, workers' compensation insurance pays the entirety of an injured workers' medical bills, Or. Rev. Stat. § 656.245, whereas private health insurance may contain deductibles or maximum payment amounts, with the result that only a portion of the injured person's medical bills are paid. Third, Oregon law mandates that all Oregon employers either carry workers' compensation insurance for their employees or be self-insured. Or. Rev. Stat. § 656.017. Health insurance is optional, and may or may not be a benefit which the employer provides at its expense. Fourth, workers' compensation insurance only is available for people who are employed, and applies only if a person sustains an injury on the job. Health insurance usually is available to anyone, subject to meeting optional minimum health qualifications (except for group insurance, for which such qualifications normally do not exist), and applies generally 24 hours per day.

Persons covered by workers' compensation insurance, in short, do not pay for their insurance, receive compensation to offset lost income due to the on-the-job injury, and have their medical expenses fully paid. They therefore are decidedly different from and better situated, at least from an insurance benefits standpoint, than persons who are injured off-the-job, who only have their health insurance to help defray medical costs. Even petitioner Jungen must acknowledge that she

has, during the course of this litigation, been differently situated than she would have been had her late husband been killed as a result of an off-the-job injury. She would not have received, as she has here under California's workers' compensation insurance scheme, over $70,000 from her husband's health insurance carrier for lost wages due to his untimely and tragic death.[3]

The state legislature's partial waiver of its sovereign immunity is a recognition of the great unfairness that could result if victims and their families were deprived of any remedy for the State's wrongful conduct. The legislature recognized that a victim of the State's negligence should not have to pay all out-of-pocket medical expenses and absorb the financial setback caused by lost wages resulting from the injury. At the same time, the legislature recognized that it must limit the State's potential liability for damages in order to spread the State's limited resources among as many people as possible.

The State's decision to retain sovereign immunity for claims by persons injured on the job allegedly as a result of the State's negligence furthers this dual goal. Because of state-mandated workers' compensation insurance, injured workers are assured of having no out-of-pocket medical costs and are further assured that their income will not be cut off just because the injury may result in lost time from work. By preventing injured workers from suing the State, the State preserves its limited resources to pay at least partially the claims of other injured persons whose off-the-job, state-caused injuries may also have resulted in medical costs and substantial lost income.

Against this background, it is apparent that petitioner wrongly assumes that persons covered by workers' compensa-

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[3] In her complaint, petitioner Jungen acknowledged receipt from petitioner Fremont Indemnity Company of over $70,000 in benefits as a result of her late husband's work-related death. Complaint, ¶ 50.

tion insurance are similarly situated to persons covered by other forms of private insurance. Equally apparent, however, is the lack of merit in petitioner's argument that the State has no rational basis for treating persons covered by workers' compensation insurance different from persons privately insured in terms of their ability to sue the State. Unquestionably, as a matter of federal constitutional law, Oregon need not waive its sovereign immunity from suit in its own courts. *Nevada v. Hall*, 440 U.S. 410 (1979). If it does waive that immunity in some circumstances, it offends no constitutional provision so long as the waiver is rationally related to a legitimate state purpose and does not interfere with the exercise of a fundamental right nor discriminate against a suspect class. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973). Because no suspect class or fundamental right is involved here, and because unquestionably the limited waiver rationally furthers the State's goal of providing limited monetary relief to persons injured or killed as a result of the State's negligence, Oregon's limited waiver of immunity survives equal protection scrutiny.

II. Petitioner Fremont Indemnity Company is not deprived of equal protection because Oregon treats it similarly to all other workers' compensation insurance carriers.

Petitioner Fremont Indemnity Company (Fremont) complains that it is denied equal protection because Oregon denies it the ability to sue Oregon to recover under its contractual and statutory subrogation rights, while Oregon permits all other types of insurance carriers to exercise their subrogation rights and sue to recover benefits paid under their insurance policies. Petitioner Fremont's argument, like petitioner Jungen's argument, proceeds from the erroneous premise that it is similarly situated to all other types of insurance carriers. Because petitioner Fremont is similarly situated only to

other workers' compensation carriers, and because Oregon treats all workers' compensation carriers equally, petitioner Fremont's claim of denial of equal protection fails.

Petitioner Fremont and other workers' compensation carriers insure against a risk far different from other insurance carriers. As the preceding discussion shows, workers' compensation insurance carriers insure against loss of income and agree to provide 100 percent medical coverage for job-related injuries. Because they insure against job-related injuries only, and because of the nature of the risk they insure against, workers' compensation carriers calculate their rates differently than do other insurance carriers.

Certainly, one of the factors workers' compensation carriers consider in setting their rates is the extent to which they may exercise subrogation rights and sue third parties to recover for claims paid their insureds. That California law statutorily subrogates workers' compensation carriers to the rights of their insureds to the extent of claims paid certainly bears on the rate companies such as Fremont will charge a particular employer. Similarly, if Fremont or any other workers' compensation carrier insures an employer who does business extensively in a State such as Oregon, in which no subrogation right to sue the State exists because no insured may sue the State, that fact also will be entered into the rate-setting calculus.

Workers' compensation carriers doing business in Oregon, either directly by insuring Oregon employers, or indirectly by insuring out-of-state employers doing business in Oregon, contract to reimburse injured workers for lost income and medical expenses resulting from on-the-job injuries, and they set their rates accordingly. Health and other insurance carriers insure against other, non-job-related risks, and set their rates accordingly.[4] It simply cannot be said that workers'

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[4] Under Oregon's workers' compensation scheme, a health insurance

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compensation and health insurance companies are similarly situated. Moreover, if workers' compensation insurance carriers believe that the inability to sue the State to recover amounts paid their insureds increases their claims costs, they always have the option of raising their rates. Where, as in the present case, a State treats all insurance carriers insuring against similar risks similarly, it adheres faithfully to the commands of the Equal Protection Clause of the fourteenth amendment.

III. Oregon's limited retention of sovereign immunity does not discriminate against interstate commerce and promotes legitimate state interests.

The foregoing discussion should sufficiently demonstrate that the State has a purpose which is served by retaining its sovereign immunity against claims by workers' compensation insureds and their carriers. The only question left under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141 (1970), is whether the State's retention of sovereign immunity from such claims operates evenhandedly. If it does, the State's retention of sovereign immunity must be upheld unless it imposes a burden on interstate commerce which is "clearly excessive in relation to the putative local benefits." *Id.* at 142.

Oregon treats all workers' compensation insurance carriers which insure employees doing business in Oregon identically in terms of their ability to sue the State to recover amounts paid their insureds or their insureds' beneficiaries. The State retains its sovereign immunity from suit as to both in-state and out-of-state workers' compensation insurance carriers' subrogation claims.

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company whose policies include coverage for work-related injuries is entitled to reimbursement from a workers' compensation insurance company covering the same injury. In other words, workers' compensation insurance is primary to health insurance, and must reimburse private health insurance to the extent of benefits the health insurance may have paid. Or. Rev. Stat. § 656.313(3).

The burden which Oregon's retention of limited sovereign immunity places on interstate commerce is no greater than if Oregon had not waived its sovereign immunity at all. If Oregon retained complete sovereign immunity, no provision of the federal constitution would confer on petitioner Fremont or on any other out-of-state workers' compensation insurer the ability to sue Oregon in Oregon courts. *Palmer v. Ohio*, 248 U.S. 32 (1918). Moreover, the burden of a complete retention of sovereign immunity would be far greater on interstate commerce, because it would prevent any out-of-state insurer of any kind from suing Oregon in Oregon courts to recover amounts paid in claims arising from Oregon's negligence. Accordingly, no reason exists to declare that a state's limited retention of sovereign immunity, with its necessarily lesser impacts on interstate commerce, violates the Commerce Clause.

CONCLUSION

Petitioners' claims, when examined, lack merit. Moreover, petitioners have failed to present any persuasive reason why this case is sufficiently important to merit this Court's review and resolution. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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